Dixon Commercial Electric Inc. *and* International Brotherhood of Electrical Workers, AFL–CIO, Local Union 364. Case 33–CA–8259

May 14, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On a charge filed on February 24, 1988, by International Brotherhood of Electrical Workers, AFL–CIO, Local Union 364 (Union), the General Counsel of the National Labor Relations Board by the Regional Director for Region 33 issued a complaint on June 8, 1988, against the Respondent, Dixon Commercial Electric Inc., alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On September 20, 1989, the Respondent, the Union, and counsel for the General Counsel filed with the Board a stipulation of facts, with exhibits attached, and a motion to have the proceeding transferred to the Board. The parties agreed that the stipulation of facts (with attached exhibits), charge, complaint and notice of hearing, and answer, would constitute the entire record in this case, and that no oral testimony was necessary or desired by any of the parties. The parties waived a hearing and the issuance of an administrative law judge's decision and agreed to submit the case directly to the Board for findings of fact, conclusions of law, and a Decision and Order. On November 1, 1989, the Board issued an order granting the motion, approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Dixon Commercial Electric Inc., an Illinois corporation with an office and place of business at Dixon, Illinois, is an electrical contractor and performs electrical construction work on both residential and commercial construction projects. During the 12 months preceding the issuance of the complaint, a representative period, the Respondent provided services valued in excess of $50,000 to several enterprises located within the State of Illinois, which enterprises are engaged in interstate commerce and meet the Board's jurisdictional standards for other than indirect inflow or outflow of goods and services. Accordingly, in agreement with the stipulation of the parties, we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

During relevant periods, the Respondent was a member of the Northern Illinois Chapter of the National Electrical Contractors Association (NECA), which in turn had negotiated a series of master collective-bargaining agreements with the Union covering electrical work in connection with residential construction projects (Residential Agreement) and a series of agreements covering work on nonresidential construction projects, including commercial electrical construction (Inside Agreement). On June 1, 1976, the Respondent signed a Letter of Assent—A (Inside Agreement) which bound it to the master Inside Agreement negotiated between the Union and NECA, and on December 1, 1976, the Respondent signed a Letter of Assent—A (Residential Agreement) which bound it to the Respondent-NECA master Residential Agreement. The letters of assent, which were valid 8(f) prehire agreements, by their terms bound the employers until they gave written notice to NECA and the Union at least 150 days before the anniversary date of the respective agreement—May 31 in the case of Inside Agreements and November 30 in the case of Residential Agreements.[1]

On September 23, 1983, the Respondent sent a letter of withdrawal to NECA, and its membership terminated as of October 25, 1983. Thereafter, on December 21, 1984, the Respondent sent the Union a notice of its intent to terminate its contract with Local 364 ''on its anniversary date of May 31, 1985.'' The Respondent complied with the terms and conditions of the Inside and Residential Agreements until May 31, 1985, but ceased to do so after that date.[2]

Thereafter, in a June 12, 1985 letter to the Respondent, the Union protested the Respondent's failure at a commercial construction project in Whiteside County, Illinois, to meet the prevailing wages and conditions in that geographic area. In declaring the limited purpose of this protest, the letter stated that the Union did not ''desire recognition.''

[1] The master agreements, in effect at the time the Respondent signed the above letters of assent, were for terms of 1 year. Subsequently, the master agreements were negotiated for terms of either 1 or 2 years. Irrespective of the length of these master agreements, their expiration dates were always May 31 for the Inside Agreement and November 30 for the Residential Agreement.

[2] After May 31, 1985, the Respondent neither received report forms from nor submitted monthly fringe benefits and contribution reports to the designated collection agency, AMCOR Bank. There is no evidence that the Union was aware of the discontinued use of the report forms.

On December 1, 1986, the Union filed a grievance under the Residential Agreement claiming that on November 7, 1986, the Respondent failed to pay the wages and make benefit payments as set forth in the Residential Agreement. In correspondence between the parties in December 1986, the Respondent took the position that its withdrawal letter of December 21, 1984, severed its relationship with the Union, including the application of the Residential Agreement. The Union argued that the Respondent remained bound to both the Inside and Residential Agreements. Then, on December 30, 1986, the Respondent's attorney wrote to the Union stating, inter alia, that ''Dixon Commercial Electric will vehemently resist any attempt by your union to claim any rights over it, nor will [it] attend any grievance scheduled by you since it is not bound by the terms of any agreements.''[3]

Thereafter, the Respondent refused to respond to the Union's request, in January 1987, for certain information relevant to contract compliance (concerning the Residential Agreement). In telephone conversations between April and June 1987 the Union's attorney spoke of possibly taking legal action against the Respondent, and the Respondent's attorney responded that the Respondent was in a precarious financial position and might go out of business if the Union took such action. In response to the Union's request for a written statement about the Respondent's financial difficulties, the Respondent's attorney wrote on June 15 that the Respondent ''intends to liquidate . . . . '' However, the Respondent thereafter decided not to liquidate, and the Union obtained information on or about August 18, 1987, indicating that the Respondent was still performing electrical work. On or about September 8, 1987, the Union was notified that the Respondent had not liquidated. In January 1988, the Union made another written demand for information regarding the Respondent's performance of residential construction work. That demand triggered more letters of position from both parties and resulted in the Union's filing of the instant unfair labor practice charge on February 24, 1988. In the complaint which issued on June 8, 1988, the General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with the information requested in January 1988 and since on or about August 24, 1987 (6 months before the charge), refusing to abide by the relevant Residential Agreement and withdrawing recognition from the Union during the term of that agreement.

[3] Negotiations for the Residential Agreement between NECA and the Union for the term December 1, 1986, to November 31, 1988, began in August 1986 and continued through February 9, 1987, the date an agreement was agreed on and signed.

B. *Contentions of the Parties*

The Respondent contends that the complaint is barred by Section 10(b) of the Act which provides that, ''[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .'' It argues that there can be no dispute that the Union had clear and unequivocal notice of the repudiation on May 31, 1985, of the Residential Agreement by its letter of December 21, 1984, and that the Union acquiesced in this repudiation by its statement in a June 15, 1985 letter that the Union was not seeking recognition. The Respondent further argues that the Union received additional notice of the repudiation on December 30, 1986, but failed to file any charge with the Board until over 1 year later, on February 24, 1988.[4]

The General Counsel contends that the complaint is not barred by Section 10(b) because the Respondent's attorney did not state categorically in December 1986 that the Respondent had repudiated the Residential Agreement, and acted equivocally in later communications by asking the Union's attorney to contact him before instituting legal action, asking what the Union would do if the Respondent went out of business, and inducing the Union not to file charges by misleading it into believing that the Respondent was liquidating its business and thereafter concealing the fact that it was continuing to perform electrical contracting work.

C. *Discussion*

The stipulated facts show that the Respondent's December 30, 1986 letter notified the Union that the Respondent would resist the Union's claim to ''any rights over it'' and denied being ''bound by the terms of any agreements.'' This letter amounted to a clear and unequivocal repudiation of the bargaining relationship between the Respondent and the Union as reflected in the expired Residential Agreement, or for that matter, of any contractual or bargaining relationship between those parties that may have existed as of the date of the letter.[5] It is further evident that there then was no pending master collective-bargaining residential agreement, inasmuch as the successor agreement to the one which had expired November 30, 1986, was not agreed to or signed until February 9, 1987. The record is de-

[4] In light of our disposition of this case on procedural grounds, we find it unnecessary to resolve the parties' positions on the merits. See fn. 6, infra.

[5] We find no merit in the Respondent's claim that it had clearly and unequivocally given notice of its repudiation of the Residential Agreement in its letter to the Union on December 21, 1984, and that the Union acquiesced to this in a letter dated June 12, 1985, stating that it did not desire recognition. The Respondent's December 21 letter providing notice of its intent to terminate its contract with the Union ''on its anniversary date of May 31, 1985,'' directly referred only to the Inside Agreement for commercial construction, which expired as of that date. Further, the Union's June 12, 1985 disclaimer of a recognitional objective was made in relation to a protest at a commercial construction site. In neither of these letters was the Residential Agreement clearly implicated.

void of any evidence that the Respondent, subsequent to its December 30, 1986 repudiation letter, reentered into a bargaining relationship of any kind with the Union. On the basis of these facts, we find that the General Counsel is barred by the provisions of Section 10(b) from alleging that the Respondent violated Section 8(a)(5) and (1), as described above, based on an unfair labor practice charge filed February 24, 1988, almost 14 months after the Respondent had clearly and unequivocally repudiated its contractual and bargaining relationship with the Union.[6] *A & L Underground*, supra.

We reject the General Counsel's argument that the Union did not have unequivocal notice of the Respondent's repudiation of the Residential Agreement in December 1986, and that the statements by the Respondent's attorney, on and after April 23, 1987 concerning the Respondent's going out of business, caused a tolling of the 10(b) period such that the unfair labor practice charge in this case was timely filed. The General Counsel correctly points out that Section 10(b) is subject to equitable principles and may be tolled where the Respondent has fraudulently concealed its unlawful conduct.[7] We find, however, that these principles are inapplicable here because this record shows no attempt by the Respondent to conceal its repudiation of its contractual and bargaining relationship concerning residential work.[8]

The General Counsel's argument is flawed in two respects. First, it relies on a December 11, 1986 letter that the Respondent's attorney wrote to the Union disputing the merits of the latter's December l grievance. That letter, however, is not the basis for the Respondent's assertion that the Union had sufficient notice of the Respondent's termination of its bargaining relationship with that labor organization. Second, and most significantly, the General Counsel has failed to note the Respondent's December 30, 1986 letter and to take into account the explicit message it conveyed, namely, repudiation of any contractual and bargaining relationship that existed with the Union. Consequently, because the 10(b) period commenced on December 30, 1986,[9] the Respondent's subsequent statements relating to its possible liquidation did not serve to conceal the Respondent's repudiation or toll the running of the 10(b) period. In the latter regard, the liquidation statements did not have the effect of rescinding the Respondent's act of repudiation and, hence, the Union cannot excuse its failure to file charges on the ground that it relied on such statements to its detriment.

Accordingly, because the instant unfair labor practice charge alleging violations of Section 8(a)(5) and (1) was filed more than 6 months after the Union's actual notice of the Respondent's repudiation of its contractual and bargaining relationship, the entire complaint is barred by Section 10(b).[10] Therefore, we shall dismiss the complaint.[11]

ORDER

The complaint is dismissed.

[6] Although the General Counsel does not claim there was any contract in effect when the Respondent sent the December 30, 1986 letter, she argues that the Respondent was barred under the doctrine of *Retail Associates*, 120 NLRB 388 (1958), from repudiating its bargaining obligation on December 30, 1986. In particular, she argues that multiemployer bargaining was then underway and the Respondent had not, before this, timely revoked its grant of bargaining authority to the multiemployer association. But all of the operative facts to prove this contention are, as noted above, outside the 10(b) period, so that argument is not properly before us. The General Counsel therefore cannot logically rely on *Farmingdale Iron Works*, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981), for the proposition that, even if the Union was aware of the Respondent's repudiation more than 6 months prior to the filing of its charge, the General Counsel would still be entitled to an order, but one limited to recovery for contract noncompliance during the 6 months preceding the filing of the charge. In *Farmingdale*, the Board considered the applicability of Sec. 10(b) to two separate kinds of contract repudiations. First, it found there had been no unequivocal expression of an intent to repudiate the entire collective-bargaining agreement outside the 10(b) period; second, with respect to allegations that the employer had failed to pay contractually required benefits, the Board held that these failures were ''separate and distinct'' violations and that therefore those occurring within 6 months of the filing of the charge were not barred by Sec. 10(b). Here, as shown above, the Respondent clearly manifested an intent to repudiate outside the 10(b) period, so we do not reach the question of contractual noncompliance even for a 6-month period. *A & L Underground*, 302 NLRB 467 (1991).

[7] Typical of situations in which such tolling occurs are cases where employers conceal their nonunion operations from the bargaining representative of their union employees, and the 10(b) period commences on the union's becoming aware of the nonunion activity. See, e.g., *Burgess Construction*, 227 NLRB 765 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

[8] There should not have been any doubt in the minds of the parties that the repudiation pertained to residential work and any related agreement. By then, the parties' bargaining relationship concerning commercial work and the Inside Agreement had long been terminated, as is evident from the Respondent's December 21, l984 letter referred to previously, and the Union's disclaimer in June 1985 of a recognitional object in picketing one of the Respondent's commercial sites.

[9] See *Drukker Communications*, 258 NLRB 734 (1981).

[10] *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960).

[11] Member Devaney agrees with his colleagues that the complaint in this case is barred by Sec. 10(b). The critical events which gave rise to the instant dispute arose in December 1986, prior to the date the multiemployer association and the Union reached an agreement on the terms of a successor agreement to the 1984–1986 Residential Agreement. As the General Counsel must rely on evidence of pre-10(b) events to establish the violation, the complaint is time-barred. See *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960); *A & L Underground*, 302 NLRB 467 (1991). (Member Devaney's dissenting opinion).